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No. 98-730

In The
Supreme Court of the United States
October Term, 1998

JANET RENO, ET AL.,
PETITIONERS
v.
MARIA WALTERS, ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondents do not contest the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents in this action challenged the procedures used by the Immigration and Naturalization Service (INS) to implement the civil document fraud provisions of section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c (1994 & Supp. II 1996). Respondents contended, and the courts below found, that the notice forms and procedures used by the INS to charge them under section 1324c failed to plainly inform them of the procedures that they had to follow to contest the charges and of the drastic consequences of failing to contest the charges. Under the INS's notice procedures, the vast majority -- over 93 percent -- of persons charged with section 1324c violations received final orders without a hearing, despite the severe and automatic consequences of these orders. C.A.E.R. 988.[1]

A. Document Fraud Statutory Scheme

1. Section 1324c, enacted in 1990, makes it unlawful for either citizens or noncitizens to knowingly engage in certain types of immigration-related document fraud, and establishes a civil procedure for adjudicating and sanctioning violations. 8 U.S.C. § 1324c. Before a 1324c final order may be issued,

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[1] "C.A.E.R." refers to the court of appeals excerpts of record, which was consecutively paginated to include both petitioners' and respondents' excerpts.

the statute expressly requires that INS furnish the individual with "notice" and the opportunity to request a hearing. 8 U.S.C. § 1324c(d)(2). The INS is the prosecuting agency for 1324c cases involving both citizens and noncitizens, and hearings are held before administrative law judges (ALJs), the same officials who preside over proceedings against employers under 8 U.S.C. § 1324a (employer sanctions) and 8 U.S.C. § 1324b (employment discrimination). Unlike a deportation hearing before an immigration judge (IJ), which is not governed by the hearing provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq., a section 1324c hearing before an ALJ must be conducted in accordance with the APA. *Compare Marcello v. Bonds*, 349 U.S. 302 (1955), *with* 8 U.S.C. § 1324c(d)(2)(B). Adverse ALJ decisions may be administratively appealed to the Office of the Chief Administrative Hearing Officer (OCAHO). 8 U.S.C. § 1324c(d)(4).[2] Section 1324c provides for judicial review of document fraud cases by means of a petition for review in the court of appeals, which is separate from the petition for review filed by aliens seeking review of adverse BIA decisions in deportation cases. *Compare* 8 U.S.C. § 1324c(d)(5) *with* 8 U.S.C. § 1252. Section 1324c's judicial review provisions were not modified by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, Div. C, 110 Stat. 3009-546 (IIRIRA), which revised deportation proceedings (now termed "removal" proceedings) and the procedures for obtaining judicial review of such

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[2] OCAHO is a unit within the Executive Office for Immigration Review (EOIR) that is distinct from the Board of Immigration Appeals (BIA). Appeals from ALJ decisions in Section 1324c cases are heard by OCAHO; appeals from IJ decisions in deportation cases are heard by the BIA.

proceedings. IIRIRA §§ 306, 309(c)(4), 8 U.S.C. § 1252.[3]

If an individual charged under section 1324c fails to submit a written request for a hearing within 60 days, she automatically receives a "final and unappealable" 1324c order. 8 U.S.C. § 1324c(d)(2)(B). Likewise, individuals who sign a waiver of their right to a hearing before the 60-day period lapses receive a final and unappealable 1324c order. The INS considers these affirmative waivers to be immediately effective and irrevocable, even within the 60-day period. C.A.E.R. 1056-57.

2. A final order under section 1324c has several consequences. Citizens and noncitizens may receive a fine ranging from $ 250 to $ 2,000 for a first offense. 8 U.S.C. § 1324c(d)(3). There are also three additional consequences for noncitizens, who comprise over 98 percent of those charged under section 1324c. C.A.E.R. 986-88.[4] First, a 1324c final order is a basis for deportation. 8 U.S.C. § 1227(a)(3)(C). Once a 1324c order becomes final, the INS may at that time bring deportation charges against the alien based on the 1324c order. Alternatively, if the alien is already in deportation proceedings based on unrelated charges (such as overstaying a visa or entering the country without inspection), the INS may

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[3] Under IIRIRA all proceedings initiated on or after April 1, 1997 are termed "removal" rather than "deportation" proceedings. IIRIRA § 309. For convenience, respondents will use the term "deportation" rather than "removal," except where differentiation is necessary.

[4] The statutory provisions of the INA containing the immigration consequences of section 1324c final orders were enacted at the same time as section 1324c, as part of the Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978.

amend the deportation charges to add the 1324c order as an additional ground of deportation. At the deportation hearing, the alien can contest the merits of all the deportation charges except the final 1324c order, which cannot be collaterally attacked at the deportation hearing. *See* Petition (Pet.) at 3.

Second, aliens with 1324c final orders are rendered ineligible for basic forms of relief from deportation that would otherwise be available at their deportation hearing. For example, individuals charged with visa overstay or entry without inspection who otherwise could obtain relief from deportation based on marriage to a U.S. citizen or long residence in this country are rendered ineligible for this relief by the 1324c final order.[5] Relief from deportation for aliens with 1324c final orders is so rare that throughout this litigation the INS was able to identify only two instances where noncitizens obtained relief. C.A.E.R. 1152-53.[6]

The third consequence of a 1324c final order is a *permanent* bar to the alien ever gaining lawful status. 8 U.S.C. § 1182(a)(6)(F).[7] Of particular significance given the

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[5] *See* 8 U.S.C. § 1182(a)(6)(F) (inadmissibility barring relief such as adjustment under Section 1255); 8 U.S.C. § 1254(a) (1996) (suspension of deportation).

[6] *See* 8 U.S.C. §§ 1182(c) (1996) (waiver for long-time permanent residents), § 1158 (asylum), 1227(a)(3)(C)(ii) (waiver for certain permanent residents, introduced by IIRIRA).

[7] There is a waiver for nonimmigrants, 8 U.S.C. § 1182(d)(3), and a limited waiver, enacted as part of IIRIRA, which is available to permanent residents or certain applicants for permanent residence who establish that the violation "was committed solely to assist, aid, or support the alien's spouse or child." 8 U.S.C. § 1182(d)(12).

government's jurisdictional position in this case, this consequence results automatically upon issuance of the 1324c final order, regardless of whether the alien is ever placed in deportation proceedings. In this case, roughly 60 percent of the respondents were processed for voluntary departure and were thus never placed in deportation proceedings.[8] C.A.E.R. 1069-74.

Despite these consequences, 93 percent of noncitizens charged under Section 1324c did not request a 1324c hearing and either signed a waiver or failed to submit a request for a hearing within the 60-day period. C.A.E.R. 988. The small percentage of cases in which hearings were requested contrasts sharply with the expectations of senior INS officials at the outset of implementation of section 1324c. One senior official anticipated that waivers by aliens would be "infrequent" because "it is of no advantage to most aliens," while another official noted that "[a]ny alien who waives his/her rights in a 274C [Section 1324c] case probably doesn't fully understand the implications of his/her actions." C.A.E.R. 858-60, 1065.

B. INS Implementation Of Section 1324c

1. The principal method used by the INS to enforce section 1324c was to serve document fraud charges on aliens already

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[8] Individuals may leave the country voluntarily for personal reasons, or may accept a form of relief known as "voluntary departure," thereby agreeing to leave the country without deportation proceedings ever being initiated. 8 U.S.C. § 1252(b) (1996). Voluntary departure is a benefit that allows aliens to depart the United States without receiving a deportation order, which would subject them to a lengthy bar to their return to this country. *See* 8 U.S.C. § 1182(a)(6)(C) (1996); 8 U.S.C. § 1182(a)(9)(A)(ii) (Supp. II 1996).

in INS custody because they were alleged to be deportable for reasons other than section 1324c, such as entry without inspection or visa overstay. As a result, almost all noncitizens charged under section 1324c were also processed by INS, at nearly the same time, for deportation charges. C.A.E.R. 1069-74.

Respondents in this case challenged the procedures used by the INS to provide notice of section 1324c proceedings, and not any aspect of deportation proceedings. However, one element of respondents' challenge to INS's 1324c notice procedures was that the INS served forms regarding both deportation and document fraud proceedings simultaneously on the same aliens and failed to communicate the separate nature of these two proceedings. For this reason respondents will first briefly describe INS processing procedures for deportation charges and then the procedures used for section 1324c document fraud processing.

(a) In the course of processing aliens alleged to be deportable, INS presented the aliens with a "Notice of Rights" in English and Spanish explaining the options of requesting either voluntary departure or a deportation hearing (form I-826). The Notice of Rights was accompanied by a "Request for Disposition" where aliens can sign to request either voluntary departure or a hearing (form I-827). C.A.E.R. 631-33, 1074. If they requested voluntary departure, they were removed from the country without deportation proceedings being initiated.

Aliens who declined voluntary departure could request a deportation hearing. To request a hearing, individuals signed the Request for Disposition I-827 form under the sentence that

states (in Spanish, if they are Spanish-speaking) "I request a hearing before an immigration judge to determine whether or not I may remain in the United States." C.A.E.R. 633. Later in their processing for deportation proceedings, these individuals were served with an Order to Show Cause (OSC), written in English and Spanish. The OSC and accompanying advisals consisted of eight pages of information, printed in English and Spanish. C.A.E.R. 604-11.[9] These forms advised aliens that they must keep the immigration court advised of their current address, and that notice of the hearing will be sent to them by mail. C.A.E.R. 606-07.

(b) In addition to the above-described forms relating to deportation charges, detained aliens who were charged with document fraud under section 1324c also received English-only forms pertaining to the section 1324c charges. The two nationally-standardized forms used by the INS to provide notice to individuals regarding section 1324c charges are the "Notice of Intent to Fine" (NIF), and the "Notice of Rights/Waiver" (NOR/W). The NIF, provided only in English, is a one-page double-sided form with additional pages attached setting forth the specific charges, one page for each count. The NIF makes no reference whatsoever to the immigration consequences of a section 1324c order, but states in three separate places that a fine and cease-and-desist order may result. C.A.E.R. 597-99.

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[9] IIRIRA replaced the OSC for deportation proceedings with a "Notice to Appear" (NTA) for removal proceedings initiated on or after April 1, 1997. Unlike the statutory provision governing the OSC, 8 U.S.C. § 1252b(a)(3)(A) (1996), the INA does not require the NTA to be written in Spanish. 8 U.S.C. § 1229 (Supp. II 1996). However, because the injunction in this case pre-dated removal proceedings, the respondents were processed under the pre-IIRIRA deportation procedures.

The NOR/W is a one-page document, also written in English, that was usually served after the NIF. The top section concerns the respondent's rights, including the right to a hearing, to discovery, and to be represented by counsel at the hearing. Following these advisals, the form contains a sentence that states:

> If you are not a citizen of the United States, you are further advised that, as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act.

C.A.E.R. 600. This single sentence is the only reference in either the NIF or NOR/W to the immigration consequences of a section 1324c order.

The bottom of the NOR/W contains a signature line allowing individuals to waive their right to a hearing before the 60-day period elapses. Individuals who execute the waiver sign an acknowledgement that states that they "agree to pay the penalty amount, as specified in the Final Order." The acknowledgement paragraph makes no reference to immigration consequences. There is no signature line on the form to request a hearing; the request for a hearing must be in writing, and must be either mailed or delivered in person to a designated INS office. 8 C.F.R. § 270.2(f).

(c) The document fraud forms do not inform the alien that the 1324c charges are distinct from the deportation charges. Nor do the 1324c forms advise the individual that the hearing they have requested on the deportation-related forms will not involve the merits of the document fraud charges and that the

alien must make a separate request for a second hearing in order to contest the document fraud charges.

Similarly, none of the Spanish-language forms that individuals receive in connection with voluntary departure or deportation proceedings provide any warning that the English-language 1324c forms contain critical information that does not appear on the forms related to deportation or voluntary departure, or that the 1324c proceedings involve a distinct charge that must be heard in a completely different hearing. Nor do the forms explain that an individual who requests a hearing on the Request for Disposition I-827 form must make a *separate* request for a section 1324c hearing before an ALJ.

Indeed, the Request for Disposition form individuals sign to request a deportation hearing says in all-encompassing terms that they will receive a "hearing before an immigration judge to determine whether or not [they] may remain in the United States." Form I-827. C.A.E.R. 633. As the district court found, this language "strongly suggests that the hearing will cover any and all matters affecting whether the alien will be deported." Thus, "many members of the class believed, erroneously, that their request for a deportation hearing also applied to their document fraud charges," while in reality, "their failure to request a hearing...on the § 274c [section 1324c] charges rendered their deportation hearing requests completely futile," because they were subject to 1324c final orders. App. 72a.[10]

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10 "App." refers to Petitioners' Appendix.

C. Procedural History Of This Litigation

1. The respondents received 1324c final orders without a hearing, because they either failed to submit a written request within 60 days or signed the waiver on the NOR/W form. They filed this case as a class action in 1994, claiming that INS practices and procedures violated the "notice" requirements of section 1324c, the notice requirements of the APA, and due process. C.A.E.R. 1.[11] After extensive discovery, including more than 40 depositions of class members and INS officers throughout the country, and production of several thousand pages of documents, the parties filed cross-motions for summary judgment.

In March, 1996, the court certified a nationwide class[12] and

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[11] Prior to filing this action, two of the class representatives challenged the adequacy of the 1324c notice they received in individual petitions for review under 8 U.S.C. 1324c(d)(5). In opposing the petitions, the INS contended that because respondents failed to request a hearing within the 60-day period, their section 1324c orders were "final and unappealable" under 8 U.S.C. 1324c(d)(2)(B), and that this provision as well as the doctrine of exhaustion of remedies precluded the court of appeals from considering respondents' due process claims. The court of appeals deferred consideration of these petitions pending resolution of this litigation, and ultimately dismissed the petitions without prejudice in light of the relief available under the injunction in this case. *Corona-Alvarez v. I.N.S.*, No. 94-70218 (9th Cir., May 18, 1998). Petitioners did not oppose jurisdiction in the district court in this case prior to the enactment of IIRIRA, and in particular did not (and still do not) contend that the judicial review provisions of section 1324c itself divested the district court of jurisdiction over the type of procedural due process challenges brought by respondents.

[12] The certified class consists of:

> All non-citizens who have or will become subject to a final

granted summary judgment to plaintiffs, holding that the 1324c notice forms violated due process and must be revised. Noting that "[t]he information provided must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections'" (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)), the court concluded that the forms do not adequately apprise respondents of their right to a hearing (69a-70a), and of the consequences of failing to request a hearing. The court found that "a confluence of factors" renders it unlikely that respondents "will understand the consequences of either executing a NOR/W or failing to request a hearing." App. 55a. The court noted, among other things, that the testimony of INS agents "indicates that the agents themselves do not understand or cannot explain the immigration consequences of a final order" and "are quite clearly unable to rectify any inadequacies in the forms;" that "the notice forms do not provide, in language clear to lay persons with little or no knowledge of the law, the consequences of a final order under § 274C, the consequences of failing to request a hearing, or the consequences of executing the NOR/W;" that "the forms fail to indicate in clear, simple terms that a document fraud final order leads to immediate deportation with almost no chance of readmission, as opposed to a mere fine;" and that "the practice of serving the NIF and NOR/W [regarding 1324c

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> order under Section 274C of the Immigration and Naturalization Act [8 U.S.C. § 1324c] because they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

App. 63a.

charges] simultaneously with the OSC and the Request for Disposition [regarding deportation charges] leaves many aliens with the false impression that the deportation hearing will also address the document fraud charge, or with the false impression that the charge in the OSC is the only charge for which the alien is deportable." App. 56a. Regarding the last factor, the court noted that many class members who requested deportation hearings nonetheless waived or failed to request 1324c hearings, even though the failure to request a 1324c hearing "rendered their deportation hearing requests completely futile" because they were subject to 1324c final orders making them deportable. App. 72a.

The court concluded that the "one-time expense" of redrafting and translating the two forms did not constitute an undue burden on the government. App. 75a-76a. The court also noted that the fact that the INS used Spanish-language OSC and Request for Disposition forms "demonstrates an awareness that, under the prevailing circumstances, Spanish translation is a component of notice 'reasonably calculated' to apprise individuals of their rights." *Id.* at 76a.

The court also found that the INS practice of obtaining affirmative waivers of the right to request a 1324c hearing within 60 days places a greater burden on the agency to demonstrate that such waivers are "knowing, voluntary, and intelligent." However, the court rejected respondents' request that the court enjoin the practice, reasoning that improved notice forms constitute an adequate remedy. App. 78a.

2. On October 2, 1996, the court issued a permanent injunction and entered judgment. The court enjoined defendants from using the current 1324c notice forms, but declined to

adopt the forms proposed by respondents, leaving the agency discretion to develop revised and translated forms. The court also required INS to provide class members who received the defective forms with an opportunity to request a hearing, but rejected respondents' proposal that class members be given actual notice of the reopening procedure. Instead, the court ordered notice by mail, and also adopted a modified version of the government's notice counterproposal requiring press releases to news wire services.[13] The court also temporarily enjoined INS from deporting class members, or enforcing or taking any action in reliance on 1324c final orders entered without a hearing, until class members are provided an opportunity to request a document fraud hearing and any reopened proceedings are resolved. App. 81a-98a. The court also ordered the INS to parole or make other arrangements to allow class members outside the country whose 1324c final orders are reopened to attend their hearings.[14]

3. The petitioners subsequently moved to amend or alter the judgment under Fed.R.Civ.P. Rule 59(e), based primarily on the enactment of IIRIRA on September 30, 1998. The district

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[13] The government proposed "issuance of a news release nationwide to every news organization in the country via the news wire." The district court added distribution via news wire services to news organizations in Central and South America. *Compare* C.A.E.R. 1202 (INS proposal) *with* App. 93a (injunction).

[14] "Other arrangements" would include affording hearings at the border. INS submitted a declaration to the district court stating that it is the agency's policy to arrange a 1324c hearing at the border for any alien processed simultaneously for voluntary departure and section 1324c who makes a timely request for a 1324c hearing from outside the country after his or her departure. Graber Decl., Defs.' Exhs. in Opp. to Mot. for S.J., Exh. 54, Clerk's Record (CR) 135.

court denied the motion, rejecting petitioners' claim that 8 U.S.C. § 1252(g), as enacted by IIRIRA, applies to this case. The court found that the respondents' claims do not "arise from" a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute *removal* orders," within the meaning of section 1252(g). App. 103a (emphasis added). The court concluded that "[b]y ordering this relief the Court is not adjudicating claims arising from deportation proceedings or the execution of deportation orders, but is instead exercising its broad power to afford equitable relief" on the due process claims arising from the separate civil document fraud procedures. App. 103a. The court modified one provision of the injunction to clarify that the injunction does not prohibit deportation of class members who are deportable on grounds unrelated to and unaffected by a 1324c order. App. 100a-116a.

4. The court of appeals affirmed in all but one respect. App. 1a-47a. The court reversed the provision of the injunction that required new notice forms to be written in English and Spanish, finding it "more appropriate to leave it to the INS to determine in the first instance how best to revise its forms so as to 'simply and plainly communicate' the necessary information." *Id.* at 46a. Like the district court, the court of appeals rejected the government's claim that section 1252(g) affected this case, noting that the claims in this case "do not arise from a 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.'" *Id.* at 43a-44a.

5. Petitioners sought rehearing, with a suggestion for rehearing en banc. The petition was denied on August 5, 1998, in an order noting that no judge of the court had

requested a vote on the suggestion for rehearing en banc. App. 117a-118a.

REASONS FOR DENYING THE WRIT

Petitioners request that the Court hold their petition pending decisions in *Reno v. American-Arab Anti-Discrimination Comm.*, No. 97-1252 (*AADC*) and *City of West Covina v. Perkins*, No. 97-1230. Neither of those cases, however, present issues that, even if resolved in the government's favor, would require a different result in this case. The instant case is based on a set of very particular facts developed through extensive discovery, and the decisions below are thoroughly grounded in these specifics. There is no conflict with decisions of other circuits, nor any important issues that are likely to have significance in other cases.

A. The District Court Had Jurisdiction Over Respondents' Claims And That Narrow Ruling Does Not Warrant This Court's Review

Petitioners ask the Court to hold their petition pending the Court's decision in *AADC*, which they contend may establish that the district court in this case did not have jurisdiction because of 8 U.S.C. § 1252(g). Section 1252(g) provides:

> Except as provided in this section [section 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute *removal* orders against any alien under this chapter.

8 U.S.C. § 1252(g)(emphasis added). The plain language of section 1252(g) thus concerns judicial review of issues arising from *removal* proceedings. As petitioners acknowledge, "[t]he purpose of Section 1252(g) is to foreclose premature judicial review *of removal proceedings* by consolidating all judicial challenges in the courts of appeals following entry of a final *removal* order." Pet. at 14 (emphasis added). Here, however, respondents did not challenge "removal proceedings," but instead raised claims arising wholly outside of removal proceedings. The courts below properly held, therefore, that respondents' claims do not fall within the coverage of section 1252(g). That ruling will not be affected by *AADC*, even if the Court were to reverse in that case. In addition, the jurisdictional ruling below does not otherwise warrant the Court's review because it does not raise recurring issues of broad applicability, and was correctly decided.

1. The jurisdictional issue in this case is entirely distinct from the issue before the Court in *AADC*. In *AADC*, respondents brought a district court action to enjoin their deportation proceedings on the ground that they were the target of selective enforcement based on their political views. The government contends that such claims may only be raised by means of a petition for review in the court of appeals if and when a final deportation order is entered. Neither party in *AADC*, however, disputes two propositions. First, both parties concede that the *general* rule under section 1252(g) is that a challenge to removal proceedings must be brought in the court of appeals. Second, neither party disputes that the respondents in *AADC* are, in fact, challenging their removal proceedings within the meaning of section 1252(g); indeed respondents are specifically challenging the Attorney General's decision to "commence proceedings" against them. In light of those two points of

agreement, the sole issue in *AADC* is whether, notwithstanding section 1252(g)'s mandate that aliens must ordinarily challenge their removal proceedings in the courts of appeals, respondents may nonetheless bring their particular challenge in district court because they allege irreparable injury due to the loss of First Amendment rights and because they cannot develop a factual record for their selective enforcement claim in an administrative proceeding.[15] Even if the Court were to hold broadly in *AADC* that there are *no* conceivable circumstances under which aliens may challenge their removal proceedings in district court, that ruling would not affect the jurisdictional ruling below.

In this case, the court of appeals did not question the general rule that -- both before and after passage of section 1252(g) -- aliens seeking to challenge deportation proceedings must do so in the court of appeals. Equally important, the court of appeals in this case -- unlike the court of appeals in *AADC* -- did not remotely suggest that it had jurisdiction because it believed that there were special circumstances warranting a departure from section 1252(g)'s mandate that the courts of appeals ordinarily have exclusive jurisdiction over challenges to removal proceedings. Rather, the court of appeals ruled, as a threshold matter, that respondents were not in fact challenging *removal* proceedings, and thus that their lawsuit did not fall within the terms of section 1252(g). That threshold ruling was based on the court's recognition that respondents were challenging only the notice procedure used

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[15] The question presented in *AADC* is "Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation."

by the INS in document fraud proceedings, which occur outside of the deportation process and which are governed by a separate set of statutory provisions.

Thus, the jurisdictional issue in this case is whether the court of appeals correctly concluded that respondents' challenge to the notice procedures used in document fraud cases under section 1324c did not raise a "cause or claim ... arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, execute removal orders ...." 8 U.S.C. § 1252(g). Because there is no dispute that the respondents in *AADC are* challenging their removal proceedings within the meaning of section 1252(g), *AADC* will not affect the issue decided by the court of appeals in this case.[16]

Indeed, the government's own description of the ruling below makes clear that the jurisdictional question in this case is not the one before the Court in *AADC*. As the petition notes (at 16), the court of appeals ruled that:

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[16] Section 1252(g) uses three very specific terms to define its coverage: the courts of appeals shall have exclusive jurisdiction over causes or claims arising from the decision to "commence proceedings, adjudicate cases, or execute removal orders." There is no question that the claims in *AADC* fall within the language of section 1252(g) because they specifically challenge the decision to "commence proceedings." Even assuming, however, that the Court were to state in *AADC* that these three terms broadly encompass the full range of decisions arising from an alien's deportation -- from the decision to initiate proceedings through and including execution of the deportation order -- this case would not be affected. The court of appeals' holding did not depend in any way on a restrictive reading of these three terms. Instead, the decision rests on the finding that respondents' challenge to the procedures used in document fraud cases falls wholly outside of the deportation process, rather than "arising from" that process.

> this case does not arise from the 'decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.' App. 43a-44a. [The court] reached that conclusion because, in its view, '[a]lthough the constitutional violations ultimately may have led to the [respondents'] erroneous deprivation, the resulting removal orders were simply a consequence of the violations, not the basis of the claims.' *Id.* at 44a-45a.

Thus, the government itself plainly acknowledges that the basis for the ruling below was not that district courts may review removal proceedings under certain circumstances, but rather that respondents' claims did not "arise from" removal proceedings.

2. Nor does the narrow jurisdictional claim petitioners have raised, considered apart from *AADC,* warrant a grant of certiorari in this case. No other circuit has decided this issue and there is thus no conflict among the courts of appeals. Moreover, given the unique nature of this case, the issue is unlikely to require resolution by this Court in the future.

There are few if any parallels to the setting of this case, which is based on the particular relationship between civil document fraud proceedings and removal proceedings. Civil document fraud proceedings under section 1324c are completely distinct from removal proceedings. Document fraud and removal proceedings are adjudicated by separate administrative officers, and are subject to separate administrative appeal and judicial review procedures. The administrative and judicial review provisions governing 1324c proceedings were in place before IIRIRA and were not modified by IIRIRA. It is difficult to conceive of another case

in which the government could make the jurisdictional argument that they are making here -- that judicial review provisions governing removal proceedings bar district court jurisdiction over a due process challenge to procedures used in a completely separate administrative proceeding that has its own separate procedure for administrative and judicial review.

Moreover, even should the Court consider that this issue has some general applicability and might ultimately have to be resolved, that resolution should take place in a case governed by all of the permanent judicial review provisions of IIRIRA. In this case, apart from section 1252(g), there is no question that the rest of 8 U.S.C. § 1252 is not applicable. *See* Pet. Brief in *AADC* at 28-30 (arguing that section 1252(g) applies to pending deportation cases, but acknowledging that the rest of IIRIRA's permanent provisions do not apply to aliens placed in deportation proceedings prior to April 1, 1997).[17] Petitioners' jurisdictional argument is unlikely to have relevance to future cases, but if there will be a need for resolution of this issue in the future, it should occur under IIRIRA's permanent rules, rather than under the limited provisions applicable in this case.[18]

3. Finally, the courts below were correct in concluding that

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[17] The respondents in *AADC* argued, *inter alia*, that even section 1252(g) does not apply to deportation cases initiated prior to April 1, 1997. If the Court accepts that contention, then the petition in this case should be denied for that reason alone.

[18] The transitional nature of this litigation is illustrated by the fact that the case was brought in part under 8 U.S.C. § 1329 (1996). Section 1329 was amended by section 381 of IIRIRA, and no longer authorizes actions brought by parties other than the government in cases filed after September 30, 1996.

section 1252(g) does not apply to this case, because it is a challenge to the INS's implementation of a completely different section of the INA -- civil document fraud proceedings under 8 U.S.C. § 1324c. Section 1252(g) is expressly limited to "any cause or claim... arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute *removal* orders" (emphasis added). The government's attempt to apply section 1252(g) is inconsistent with the provision's plain language.[19]

Recognizing the limiting language of section 1252g, petitioners argue that this case does arise from removal decisions or actions because the deprivation of liberty on which respondents' due process claim is based "is their removal," and "without an actual, pending, or threatened removal," they "would have no due process claim at all." Pet. at 16. That

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[19] Comparison of section 1252(g) with section 1252(f), another provision added by IIRIRA, reinforces the significance of section 1252(g)'s explicit limitations. Section 1252(f), which is not applicable to this case because it only applies to challenges to removal proceedings initiated on or after April 1, 1997 (*see* IIRIRA § 309(c)), provides:

> *Regardless of the nature of the action or claim* or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

8 U.S.C. § 1252(f)(1) (emphasis added). In contrast, section 1252(g) applies only to specified causes or claims -- those arising from decisions or actions regarding removal -- and does not apply "regardless of the nature" of the claim.

analysis is flawed.

The due process violation that respondents have raised is their irrevocable loss of the right to a hearing to challenge the entry of a 1324c order against them. Contrary to the government's characterization of respondents' case, however, the deprivation suffered by respondents because of their 1324c final orders is not limited to their removal from the country, but includes all of the other consequences of a 1324c final order, including the permanent bar to ever obtaining lawful status, and the monetary fine itself.

Because many of these other consequences of a 1324c final order occur regardless of whether the alien is placed in removal proceedings (or even threatened with removal), class members who completely avoid removal proceedings, either by accepting voluntary departure or because the INS neglects to pursue removal proceedings, are nonetheless deprived of significant interests. In addition to the monetary fine, they are permanently barred from obtaining lawful residence status in this country, even though they may have accepted voluntary departure precisely to preserve their prospects for immigrating in the future. Having lost all opportunity to challenge the 1324c charges before an ALJ, such individuals suffer a serious deprivation even though they are *never* placed in removal proceedings. *See*, *supra*, Statement at 4-5.

Moreover, respondents did not challenge the 1324c notice forms solely on the ground that they failed to inform individuals of the statute's immigration consequences, but also on the grounds that the forms are not reasonably calculated to provide adequate notice because they are served only in English and use unduly complicated language (Complaint, ¶¶

28, 30, 79-80, C.A.E.R. 9-10, 23), and that service of 1324c forms at the same time as forms used in deportation processing is confusing and misleads individuals as to the procedures for requesting a 1324c hearing. *Id.* at ¶ 30-31, C.A.E.R. 10. Nor did respondents challenge the notice forms solely on due process grounds, but also alleged that the notice violated the "notice" requirement in section 1324c itself. Complaint, C.A.E.R. 24; *see* 8 U.S.C. § 1324c(d)(2)(A). Even under the government's jurisdictional theory, section 1252(g) would not cover respondents' claim that the unduly complicated and technical langauge of the 1324c notice forms violated the statute's notice requirement. The government cannot suggest that the district court should have divided the claims in this case. To expand section 1252(g)'s bar to jurisdiction beyond claims challenging removal, as petitioners propose, would pose an impossible task for district courts and could not have been contemplated by Congress. Although final orders under section 1324c have immigration consequences, Congress specifically chose to create a separate administrative and judicial review scheme for 1324c proceedings for both citizens and noncitizens -- procedures that were in place before IIRIRA and were not modified by IIRIRA.[20]

Petitioners' jurisdictional theory would also lead to

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[20] As noted, petitioners do not contend that the special judicial review provisions of section 1324c preclude district court jurisdiction in cases where, as here, the individual received a final document fraud order without a hearing and is challenging the adequacy of the notice provided by INS. Indeed, the government specifically argued to the court of appeals that individuals in that position could not raise their challenge by means of a petition for review under section 1324c(d)(5), because that procedure was unavailable if the alien failed to timely request an administrative hearing. *See supra* at 10, n.11.

arbitrary results. U.S. citizens charged under section 1324c could *immediately* bring any challenge to any deficiency in the notice they received. On the other hand, noncitizens who accepted voluntary departure or who were not placed in removal proceedings could *never* challenge the notice that resulted in their 1324c final order. This is so even though some of the defects in INS's 1324c notice procedures challenged by respondents in this case are not specific to non-citizens (for example, that the forms use unduly complicated language).

These results highlight the error of petitioners' overbroad reading of section 1252(g). Indeed, under petitioners' analysis, section 1252(g) would bar a district court from considering a defendant's claim in a criminal case that he was misled into entering a guilty plea by erroneous information as to the plea's immigration consequences, and would require that this claim be raised in a removal proceeding in the court of appeals on a petition for review. Section 1252(g)'s limitation on causes or claims "arising from" removal actions cannot be read so broadly.

In short, respondents did not challenge any aspect of removal proceedings but rather the deficient notice resulting in the loss of all opportunity to contest 1324c charges. Their claims thus fall wholly outside the scope of section 1252(g).

B. There Is No Need For This Court To Review The Judgment Of The Courts Below That The Predeprivation Notice Challenged In This Case Was Deficient

Petitioners argue that due process does not require that notice "inform the individual of details about the legal procedures, or the potential consequences of the action, when such information is available from other public sources, such as statutes or regulations." Pet. at 19. They ask the Court to hold the petition pending resolution of *City of West Covina v. Perkins*, which they claim presents a related question. However, the issue in *City of West Covina* concerns only what notice is required of *post*-deprivation remedies, and is completely distinct from this case, which involves pre-deprivation notice.

1. Although the government's petition in this case nowhere mentions this fact, the distinction between *pre-* and *post-*deprivation notice is central to their contentions in *City of West Covina*. The issues before the Court in that case are:

> 1. Whether the procedural component of the Fourteenth Amendment's Due Process Clause requires a police department to provide legal advice and guidance concerning how to pursue *post-deprivation judicial remedies* for the return of property seized during the execution of a search warrant.
>
> 2. Whether the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) should be used by federal courts to expand procedural rights *in the context of post-deprivation remedies.*

66 U.S.L.W. 3715 (May 5, 1998) (emphasis added). The Solicitor General, as amicus in *City of West Covina*, argues that "[t]he due process 'notice' requirement is satisfied when law enforcement officers give individualized notice that property has been seized." Ami. Brief at 7. Once such notice is given, "[t]he government may then rely on the public availability of applicable laws and rules of procedure to inform persons of their legal remedies and how to invoke them." *Id.* However, in distinguishing *Memphis Light, Gas & Water, Div. v. Craft*, 436 U.S. 1 (1978), the Solicitor General expressly distinguishes between the pre- and post-deprivation context:

> *Memphis Light* involved the question of what notice an agency must give about predeprivation procedures. In the predeprivation hearing context, individualized notice about the procedure for challenging government action *may often be necessary* to make the opportunity for a hearing a meaningful one.... In contrast, in the present context, the required hearing is a post-deprivation hearing, and persons whose property has been seized will have sufficient time to learn about their remedies through appropriate inquiries or research without suffering a final deprivation of property.

Ami. Brief in *City of West Covina* at 24 (emphasis added).

In this case, the notice in question is predeprivation notice of the opportunity to request a hearing, which is the only means to contest the entry of a final document fraud order. Thus, *City of West Covina* is inapplicable to this case.

2. This case raises no issue regarding due process notice requirements in the pre-deprivation context that warrants review by this Court. The rulings of the lower courts that the

predeprivation notice in this case was inadequate were correct and were narrowly tied to the extensive factual record in this case. *See* App. 7a-12a, 18a-21a, 51a-56a, 67a-77a. The district court based its decision on the "confluence of factors" present in this case. App. 55a. There is no need for this Court to review the lower courts' judgment that the particular facts and circumstances in this case warranted revised notice procedures.

Indeed, the evidence in this case established that INS frequently obtained waivers of 1324c hearings from unrepresented aliens, usually on the day they were charged and while they were in INS custody. C.A.E.R. 1059-62. In this context, aliens must have adequate notice because they have no other means of informing themselves as to the consequences of the 1324c orders or the procedures for requesting a hearing to contest the charges.

Relying on the particular factual setting of this case, the court of appeals properly rejected the government's contention that the INS need not give notice of section 1324's immigration consequences because they are collateral to 1324c proceedings. App. 19a n.5. The same statute that created section 1324c also established these immigration consequences; the consequences are virtually automatic; the same agency prosecutes document fraud and deportation cases; and nearly all persons charged by the INS under section 1324c were also charged by the INS for deportation proceedings or for voluntary departure at nearly the same time. For these reasons the government's reliance on cases in the criminal context is misplaced. Pet. at 17-18. Unlike in the 1324c context, there are numerous, serious consequences that result from a criminal conviction, immigration and non-immigration related, and thus, the burden

on the court would be significantly greater if there was an obligation to inform the defendant about all of the consequences that flowed from the plea. Moreover, here, unlike in the criminal context, the INS is the entity responsible for prosecuting both section 1324c and removal proceedings.[21]

Petitioners also contend that the due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is inapplicable in determining the adequacy of notice. Pet. at 19-20. However, in the factual setting of this case, whether or not the *Mathews* test applies would not affect the *result*. In the course of determining the risk of erroneous deprivation, the district court explicitly evaluated the 1324c notice forms under the standards set forth in the landmark due process notice cases of this Court:

> The risk of erroneous deprivation is directly linked to the issue of whether the NIF and NOR/W form apprise a § 274C respondent of his or her right to a hearing. Due

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[21] Notably, the INS in enacting 1324c regulations explicitly recognized that individuals who waive the right to a 1324c hearing must be informed of the statute's immigration consequences. Responding to commentators who opposed the use of a waiver procedure for unrepresented respondents because they "would not be advised properly of the adverse effects a Final Order may have in future immigration proceedings," the INS stated that "[t]he Service recognizes that a waiver, in order to be given effect, must be made voluntarily and with full knowledge of the consequences. Accordingly, the INS intends to fully advise respondents (including detainees) of their rights under section 274C prior to the acceptance of a waiver." 57 Fed. Reg. 33864 (July 31, 1992), C.A.E.R. 865. *See* 8 C.F.R. § 270.2(f) ("a respondent who is not a U.S. citizen will be advised that a waiver of a section 274c hearing will result in the issuance of a final order and that the respondent will be excludable and/or deportable from the United States").

> process requires that a person facing governmental deprivation of life, liberty or property receive adequate notice and an effective opportunity to defend. *Goldberg v. Kelly*, 397 U.S. 254, 267-68... (1970). The information provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Memphis Light, Gas & Water Div. v Craft*, 436 U.S. 1, 13 (1978).

App. 69a. After explaining these principles, the court carefully examined the evidence regarding the characteristics of most persons charged under section 1324c, the language used on the forms, the circumstances in which the notice forms are used, and the impact of service of the 1324c forms at the same time as the deportation-related forms. App. 70a-75a. The court's factbound conclusion that the forms violate due process was based on its finding that the notice forms do not adequately apprise respondents of their right to hearings and of the consequences of failing to request a hearing. Since the court in its use of the *Mathews* test simply incorporated and applied traditional due process notice principles, the result plainly would have been no different were the Court to find that *Mathews* does not apply to the determination of the adequacy of notice. *See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)(the Court "reviews judgments, not opinions").

CONCLUSION

Neither *AADC* nor *City of West Covina* present issues that, even if resolved in favor of the government, would warrant a different result in this case. Because this case is narrowly tied to its particular facts and presents no issue warranting review by this Court, the petition for writ of certiorari should be denied.

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